Supreme Court, U.S.
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# In The
# Supreme Court Of The United States

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GOLD KIST INC. AND TEAMSTERS and
CHAUFFEURS UNION, LOCAL 612,
*Petitioners,*

*v.*

JIMMY HOOPER, ROBERT MCELRATH,
EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS,
TROY MARCHBANKS, STEVE TURNER,
and JIMMY UPTAIN,
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a group of feed mill employees represented by a union may state a claim for breach of a collective bargaining agreement based solely on the existence of a collectively bargained ancillary agreement that provides potential additional compensation to a separate group of truck drivers within the same bargaining unit.

2. Whether a group of feed mill employees may state a claim for breach of the duty of fair representation based solely on the union's negotiation of an agreement to continue a longstanding incentive bonus for truck drivers where, after good-faith bargaining, the union was unsuccessful in its attempt to obtain, through negotiation, a similar incentive bonus for feed mill employees.

3. Whether employees are required to exhaust their contractual grievance and arbitration remedies before asserting claims for breach of a collective bargaining agreement upon which a hybrid Section 301/duty of fair representation claim is based where such claims for breach of the collective bargaining agreement are based on a collectively bargained ancillary agreement that provides potential additional compensation to a separate group of employees within the bargaining unit.

## PARTIES TO THE PROCEEDING

The parties before this Court are those set forth in the caption.[1]

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[1] Gold Kist Inc., a Georgia corporation, is an agricultural cooperative of 31,000 farmers. Subsidiaries of Gold Kist Inc. include Agratech Seeds Inc.; Agratrade Financing, Inc.; Agvestments, Inc.; Carolina Golden Products Company, Inc.; Commerce Ventures, LLC; Cross Equipment Company, Inc.; Dixico Pet Food, Inc.; GC Properties; GK/LOL, LLC; GK Pecans, Inc.; GK Finance Corporation; GKX, Inc.; and Luker Inc. Gold Kist owns a 33 percent stake in Golden Peanut Company through its partnership with Archer Daniels Midland and Alimenta Processing. Gold Kist owns a 25 percent stake in Young Pecan Company. Gold Kist also owns a stake in Scott G. Williams LLC. There are no parent companies or other non-wholly-owned subsidiaries.

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## REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The District Court for the Northern District of Alabama granted Gold Kist Inc. and Teamsters Local 612 summary judgment on January 21, 1999. (App. at 8a.) On February 7, 2000, the United States Court of Appeals for the Eleventh Circuit issued its decision reversing summary judgment. The decision of the Eleventh Circuit is not reported. (App. at 1a-7a.) Petitioner's timely petition for rehearing was denied on April 11. (App. at 42a.)

## STATEMENT OF JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on February 7, 2000. A timely petition for rehearing was filed on February 28, 2000. On April 11, 2000, the court of appeals denied the petition for rehearing. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1993).

## RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set forth in the Appendix at 44a-51a. These are 29 U.S.C. § 158(a)(5) (1998), 29 U.S.C. § 158(d) (1998), 29 U.S.C. § 159(a) (1998), 29 U.S.C. § 173(d) (1993), and 29 U.S.C. § 185 (1993).

## STATEMENT OF THE CASE

Petitioner, Gold Kist Inc., produces and markets poultry products at various facilities located throughout the United

States. Its operations include a feed mill in Jasper, Alabama, where it manufactures chicken feed. This operation employs laborers in the feed mill department and drivers in the trucking department. (App. at 10a-11a.) Feed mill employees unload the raw ingredients from railcars and supply trucks, combine the ingredients for the manufacture of the feed, and load the feed on Gold Kist feed-haul trucks so the drivers can deliver it to chicken farms. All employees at the Jasper feed mill operation, including feed mill employees and drivers, are represented by Teamsters Local 612 ("Union"). (App. at 10a-12a.)

Employees of the feed mill have been represented by the Union since Gold Kist purchased the facility in the early 1970s. Since that time, Gold Kist and the Union have negotiated collective bargaining agreements approximately every three years. (App. at 11a & 31a.) The current labor contract is effective February 1, 1998, through January 31, 2001. (App. at 11a, 33a, & 102a.) Respondents in the present case are 8 of the 17 feed mill employees. (App. at 11a.)

**A. History of incentive programs at Jasper feed mill**

The facts relevant to Respondents' claims are essentially undisputed. During contract negotiations in the mid 1970s, Gold Kist and the Union orally agreed to an incentive pay plan for the drivers based on mileage and tonnage to encourage the drivers to work more efficiently and haul more feed in a shorter period of time. (App. at 13a.) Pursuant to the agreement, drivers earn the hourly rate set forth in the collective bargaining agreement or the incentive rate, whichever is higher. To date, the driver incentive plan is unwritten except for the written formulas used to calculate incentive

pay and thus determine whether a driver receives the incentive pay or the hourly rate. (App. at 13a.)

In the late 1970s, the Union proposed, and the parties agreed upon, an incentive plan for the feed mill employees. (App. at 13a.) This plan, like the incentive plan for the drivers, was an oral agreement between Gold Kist and the Union. The plan proved to be unworkable, however, and the feed mill employees were rarely able to earn incentive pay under this plan. (App. at 13a.)

Consequently, the Union proposed in negotiations for the 1980 contract that the feed mill employees receive additional pay of 10 cents an hour in place of the unsuccessful incentive plan. (App. at 13a.) Gold Kist accepted this proposal, and an agreement to that effect was ratified by the membership and has been adopted in every collective bargaining agreement since 1980. (App. at 13a.) The wage schedule of the current agreement states that "[i]n addition to rates set forth in the above wage schedule, an additional ten cents (10¢) per hour will be paid to all feed mill employees in lieu of the incentive plan." (App. at 105a.) Significantly, drivers do not receive this guaranteed hourly bonus.

The feed mill employees have continued to receive 10 cents an hour over the rate published in the wage schedules attached to each of the 1980, 1983, 1986, 1989, 1992, 1995, and 1998 collective bargaining agreements. (App. at 13a.) Throughout this same period of time, the drivers' incentive plan continued.

**B. 1998 contract negotiations**

During negotiations for the 1998 agreement, the Union proposed an incentive plan for feed mill employees, and the Union's proposal was thoroughly discussed. (App. at 13a.)

Although the Union's incentive plan proposal was not agreed upon, the Union was able to obtain a 30-cent hourly increase in wages for the first year of the collective bargaining agreement and additional increases in each year thereafter. (App. at 104a.) The feed mill employees, unlike the trucking department employees, also specifically received a guaranteed 10-cent-an-hour premium in lieu of an incentive pay plan.

The Union conducted a ratification vote on the contract among all employees. Thirty-one of the 32 members of the unit, including all of the Respondents, were present. Respondent Nichols, in his role as shop steward, presided over the vote count and recommended acceptance of the contract —without an incentive plan for feed mill employees. The vote was 26 employees for the contract and 5 against. (App. at 13a.) Therefore, it is uncontroverted that at least 11 of the 17 feed mill employees affirmatively voted for the proposed contract. Even though several Respondents voted for the contract on January 27, this suit was commenced on February 13, 1998.

**C. Proceedings in the district court**

Respondents commenced this action in the Northern District of Alabama on February 13, 1998, as a "classic hybrid" Section 301 (Labor-Management Relations Act)/ duty of fair representation action alleging that Gold Kist breached various collective bargaining agreements and that the Union breached its duty of fair representation to Respondents and other similarly situated employees under those collective bargaining agreements. (App. at 61a.) Construed most favorably for Respondents, the Amended Complaint sets forth only one alleged breach of the collective

bargaining agreement—that Gold Kist "breached" the wage provisions of the agreement by paying the drivers amounts of pay calculated via the negotiated incentive pay plan rather than the hourly rates set forth in the agreement. Considered as a whole, the Amended Complaint may arguably be read to allege that the Union breached its duty of fair representation by negotiating incentive pay for the drivers but not for the feed mill employees.

On May 8, 1998, in an opinion by District Judge William M. Acker, Jr., the court disposed of any and all claims asserted by Respondents under collective bargaining agreements prior to the 1998 agreement. (App. at 28a-29a.) Respondents did not appeal Judge Acker's partial grant of summary judgment to Gold Kist and the Union.

On January 21, 1999, District Judge Inge P. Johnson issued her memorandum opinion granting Gold Kist and the Union summary judgment. (App. at 8a-27a.) Judge Johnson's decision disposed of any and all claims alleging violations of the 1998 collective bargaining agreement. (App. at 26a.) In this opinion, the district court first addressed Respondents' claims against Gold Kist for breach of the 1998 collective bargaining agreement based on the payment of incentive pay for drivers but not for the feed mill employees (App. at 18a), stating:

> This court cannot find any logic in this argument. Assuming this court ordered the defendants to void their verbal contract and pay the truck drivers solely the hourly wage specified in the contract, the plaintiffs here would not earn any more money.
>
> . . . . No where [sic] can this court find justification for the plaintiffs' proposition that paying an em-

> ployee more than a required amount violates a contract, nor do plaintiffs cite any legal support for this novel contract interpretation. This court also cannot find any basis for the plaintiffs [sic] proposition that the verbal contract between Gold Kist and the truck drivers is contrary to the collective bargaining agreement.

(App. at 18a.) In addition, the district court held that Respondents were not damaged by any "alleged breach." (App. at 19a.) The court thoroughly analyzed the three sections of the collective bargaining agreement that Respondents alleged were breached and found that none of these provisions had been violated by Gold Kist. (App. at 19a-20a.) The court further found that the agreement with regard to incentive pay for drivers did not violate the collective bargaining agreement. (App. at 20a-21a.) Finally, the court recognized that Respondents "apparently want this court to order the defendants to renegotiate the contract that at least some of these plaintiffs voted to approve to obtain what they could not obtain through the collective bargaining process." (App. at 21a.)

The district court also found that the Union did not breach its duty of fair representation. The court characterized Respondents' claims as a "mere bald allegation that the Union somehow acted in bad faith because no incentive pay agreement was reached." (App. at 22a-23a.) The court further recognized the impossibility of Respondents' claims that the Union had breached its duty of fair representation, noting that Respondents alleged that on the one hand, the Union had knowledge of the truck driver incentive pay, and on the other hand, Gold Kist breached the contract because the Union would have negotiated for a greater rate of pay

for *all* employees if the Union had known of the driver incentive pay. (App. at 21a-22a.) The district court held alternatively that Respondents failed to exhaust their administrative remedies prior to commencing this action in the district court. (App. at 24a-26a.)

**D. The court of appeals proceedings**

On February 17, 1999, Respondents filed a notice of appeal with the United States Court of Appeals for the Eleventh Circuit. The court of appeals acquired jurisdiction pursuant to 28 U.S.C. § 1291 (1993).

On February 7, 2000, a majority of the court of appeals panel reversed the district court's grant of summary judgment, holding that a reasonable jury could find that Gold Kist breached the collective bargaining agreement and the Union violated its "fiduciary" duty. (App. at 4a.) More specifically, the majority concluded that a reasonable jury could find a breach of the collective bargaining agreement because Article 1, Section 5, prohibits "individual agreements between the Company [Gold Kist] and an employee in conflict with this agreement" and because Article 27, Section 11, requires that any modification be in writing. (App. at 5a.)

Judge Black dissented. (App. at 7a.) She concluded that "[e]ven assuming Gold Kist did breach the collective bargaining agreement, I do not believe a reasonable jury could conclude that the Union violated its duty of fair representation." (App. at 7a.) Judge Black found that "[a]lthough the 'side agreement' did favor the truck drivers, Appellant has not alleged any facts to show that this was the result of a breach of the duty of fair representation." (App. at 7a (citing *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 129 (2d

Cir. 1998)). Finally, Judge Black noted that Respondents' "proper recourse is to be found in the collective bargaining process, not the courts." (App. at 7a.)

Petitioners now file this petition for certiorari.

## REASONS FOR GRANTING WRIT

The Court should grant the writ because:

1. This case presents important questions of statutory interpretation arising under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 to 169 .

2. The Eleventh Circuit ruling directly contradicts numerous standing decisions of this Court. *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

3. This case presents a conflict between the Eleventh Circuit and every other court of appeals that has addressed the issues presented. *See Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 127 (2d Cir. 1998); *Griffin v. Air Line Pilots Ass'n, Int'l*, 32 F.3d 1079, 1083-84 (7th Cir. 1994); *Moreau v. Local Union 247, Int'l Bhd. of Firemen & Oilers*, 851 F.2d 516, 519-20 (1st Cir. 1988); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988); *Van Leeuwen v. United States Postal Serv.*, 628 F.2d 1093, 1096-97 (8th Cir. 1980); *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321, 1330 (9th Cir. 1980); *Goodin v. Clinchfield R.R. Co.*, 229 F.2d 578, 579 (6th Cir. 1956).

## I.

### The Eleventh Circuit's Decision That Respondents Have Alleged Facts Sufficient To State A Claim For Breach Of Contract Is In Conflict With The National Labor Relations Act As Well As Decisions Of This Court And Of Other Courts Of Appeals.

A hybrid Section 301/duty of fair representation lawsuit involves interdependent claims that (1) a company breached the collective bargaining agreement and (2) a union violated its duty of fair representation. As Judge Black recognized in her dissent, a plaintiff must prove both a breach of the collective bargaining agreement by the company and a breach of the duty of fair representation by the union in order to prevail in a hybrid Section 301/duty of fair representation action. (*See* App. at 7a (citing *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988), and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976)); *see also UPS v. Mitchell*, 451 U.S. 56, 67 (1981) (Stewart, J., concurring) ("plaintiff must prevail upon his unfair representation claim before he may even litigate the merits of his § 301 claim against the employer").

Whether a union has breached its duty of fair representation is frequently the pivotal question in a Section 301 action alleging that the employer breached a collective bargaining agreement. *See, e.g.*, *Del Costello v. IBT*, 462 U.S. 151, 164-65 (1983); *Vaca v. Sipes*, 386 U.S. 171, 183 (1967) ("question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. § 301 charging an employer with a breach of contract"). Of course, a viable claim for breach of

the extant collective bargaining agreement is equally essential to a hybrid Section 301/duty of fair representation claim. As the district court recognized in this case, "[U]nless Gold Kist breached the contract by paying the truck drivers more than the stated rate, there can be no breach of the duty of fair representation [by the Union]." (App. at 17a.)

Three absolute and irrefutable truths demonstrate the logical impossibility of Respondents' claims that Gold Kist has breached the collective bargaining agreement under any accepted standard for maintaining an action under Section 301:

1. It is undisputed, as is clear from the collective bargaining agreement, that Gold Kist has not *agreed* to pay mill workers any incentive bonus or pay other than that set forth in the collective bargaining agreement.
2. For Gold Kist to provide any pay to Respondents other than the pay specifically negotiated with the Union would violate the NLRA. 29 U.S.C. § 158(a)(5).
3. No court, arbitrator, or administrative agency may compel Gold Kist to agree to any proposal or make any concession in collective bargaining. 29 U.S.C. § 158(d).

Respondents have alleged no facts sufficient to sustain an action for breach of a collective bargaining agreement. Rather, their claim that Gold Kist violated the collective bargaining agreement is plainly an attempt to obtain through litigation what they could not obtain through the collective bargaining process. Respondents simply make the incredible claim that Gold Kist pays truck drivers more than the rate stated in the 1998 contract and that as a result, Respondents have somehow lost income because drivers make more

money than the contract's wage schedule enumerates. (App. at 60a-61a.) The implausibility of this claim was plainly evident to the district court: "This court cannot find any logic in this argument. Assuming this court ordered the defendants to void their verbal contract and pay the truck drivers solely the hourly wage specified in the contract, the plaintiffs here would not earn any more money." (App. at 18a.) Likewise, as the district court stated, Respondents cannot justify or cite any authority to support their "novel contract interpretation." (App. at 18a.)

There is no dispute that Respondents have received the wages and other benefits established in the agreement. They do not allege otherwise. Respondents therefore cannot establish any breach of the collective bargaining agreement and have suffered no damages. Respondents, moreover, ratified this contract without an incentive plan for feed mill employees. The current contract, like the predecessor contracts since 1980, clearly provides that "an additional ten cents (10¢) per hour will be paid to all feed mill employees *in lieu of the incentive plan.*" (App. at 105a (emphasis added).) As the contract makes clear, and as the district court found based upon undisputed facts, an incentive plan for the drivers has been established for many years through successive collective bargaining agreements. (App. at 13a & 105a.) The district court correctly observed that Respondents "apparently want this court to order the defendants to renegotiate the contract that at least some of these plaintiffs voted to approve to obtain what they could not obtain through the collective bargaining process." (App. at 21a.)

The evidence clearly establishes that Respondents receive pay in accordance with the wage schedule for the current contract, which includes a 10-cent-an-hour premium in lieu of an incentive plan. It is equally true that Respon-

dents' subjective desire to make more money does not equate to a cognizable breach of contract claim. In fact, for Gold Kist to offer Respondents any incentive bonus or other pay not agreed to by the Union as Respondents' statutory exclusive bargaining representative would violate the NLRA. *Edward S. Quirk Co.*, 330 N.L.R.B. No. 137, 2000-01 NLRB Dec. (CCH) ¶ 15424 (2000) (holding that employer unlawfully implemented an incentive plan for union-represented employees without first bargaining to agreement with the union); *Jimmy Dean Meat Co.*, 227 N.L.R.B. 1527 (1977) (same).

Section 8(d) of the NLRA further demonstrates the implausibility of Respondents' claims:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession* . . . .

29 U.S.C. § 158(d) (emphasis added). The legislative history of Section 8(d) demonstrates that this provision was enacted in direct response to decisions of the National Labor Relations Board ("NLRB" or "Board") finding that employers had violated the NLRA by refusing to agree to specific collective bargaining proposals:

> [T]he present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. The Board has gone so far as to hold an employer's refusal to compel workers to become and remain members of unions, under so-called "closed shop" arrangements, to be evidence that the employers had not bargained "in good faith". (See *Matter of International Filter Co.*, 1 N.L.R.B. 489 (1936); *Matter of Columbian Enameling and Stamping Co.*, 1 N.L.R.B. 181 (1936); *Matter of Jackson Daily News*, 9 N.L.R.B. 120 (1938); *Matter of Uhlich and Co.*, 26 N.L.R.B. 679 (1940); *Matter of J. I. Case Co.*, 71 N.L.R.B. No. 182 (1946).)
>
> The Board has held it "unfair" for an employer to insist that he and the union settle their differences by collective bargaining, instead of submitting them to some form of "collective litigation" like arbitration (*Matter of Dallas Cartage Co.*, 14 N.L.R.B. 411 (1939); *Matter of Register Publishing Co.*, 44 N.L.R.B. 834 (1942)).

H.R. Rep. No. 245, at 19 (1947) on H.R. 3020, 80th Cong. (1947). Enacting Section 8(d), Congress made clear that it was ratifying the principles of *NLRB v. Jones & Laughlin Steel Corp*, 301 U.S. 1, 45 (1937), in which the Court observed:

> The Act does not compel agreements between employers and employees. It does not compel any

> agreement whatever. It does not prevent an employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine . . . ." The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel . . . .

(Footnote omitted); *see* H.R. Rep. No. 245 on H.R. 3020. The Court further observed in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488 (1960), that Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by *any* governmental power to regulate the substantive solution of their differences." (Emphasis added.) Section 8(d) of the NLRA was specifically intended to encourage collective *bargaining*, not the "collective *litigation*" represented by this action. *See* H.R. Rep. No. 245 on H.R. 3020. In this case, there is no contention that Gold Kist did not bargain fully and in good faith in negotiating the 1998 agreement.

In light of the clear limitation of Section 8(d) on the authority of the NLRB and the courts, there is no conceivable remedy for the claim asserted by Respondents. In short, even if by some artifice of reason Respondents could establish a jury issue with respect to breach, the NLRA denies a court the authority to order Gold Kist to establish an incentive plan for feed mill employees.

The principles of majority rule and a union's exclusive representation of employees are fundamental tenets of federal labor law. 29 U.S.C. § 159(a) (1998); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50,

62-65 (1975); *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881, 885-86 (11th Cir. 1985) (indicating that a basic premise of unionism is the sacrifice of individual rights for collective rights). Nevertheless, the court of appeals majority relied on Article 1, paragraph 5, of the current collective bargaining agreement as support for a conclusion that the incentive pay plan for drivers in some way breached that agreement. (App. at 5a.) Paragraph 5 states: "There shall be no individual agreements between the Company and an employee in conflict with this Agreement." (App. at 68a.) The majority's reliance on this provision demonstrates a clear misunderstanding of basic labor law.

The clause on which the court of appeals relied is a portion of the recognition article, which is a standard provision of a collective bargaining agreement. Paragraph 5 is simply a contractual provision reflecting the mandate of the NLRA that individual contracts with *employees* in a bargaining unit are prohibited because individual contracts conflict with the collective rights established by the NLRA, 29 U.S.C. §§ 151 to 169. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-38 (1944). The principle of exclusive representation prohibits individual contracts with employees and prohibits a company from bargaining with employees individually. *Emporium Capwell*, 420 U.S. at 62-65. Under the NLRA, once it is recognized by the employer or certified by the NLRB, a union is the exclusive bargaining representative of the employees. Article 1, paragraph 5, does not prohibit an agreement between *the Union* and Gold Kist affecting a *group of employees*, such as the drivers; it prohibits agreements between Gold Kist and *individual employees*. The agreement between the Union and Gold Kist for an incentive plan for drivers is therefore not a violation of the collective bargaining agreement. This lawsuit, in contrast, is an effort by Re-

spondents to undermine the exclusivity principle and the agreements reached between Gold Kist and the Union in the legally mandated collective bargaining process.

The Eleventh Circuit's opinion is in direct conflict with the decision of the First Circuit in *Moreau v. Local Union 247, International Brotherhood of Firemen & Oilers*, 851 F.2d 516 (1st Cir. 1988). There, a local union negotiated a "side agreement" to a ratified collective bargaining agreement that restricted certain employee transfers within the bargaining unit. *Id.* at 517. The side agreement was agreed to by the bargaining representative and the company and set forth in a written, but unsigned, memorandum prepared by the company. *Id.* at 517-18. The side agreement directly contradicted a provision of the collective bargaining agreement requiring that job vacancies be filled according to seniority. *Id.* at 517. An employee who was denied a requested transfer because of the terms of the side agreement brought a Section 301/duty of fair representation claim against the employer for breach of the agreement and against the union for declining to process his grievance. *Id.* at 518.

The First Circuit affirmed the district court's grant of summary judgment to the employer and the union. The court first noted that "the local unions could void old side agreements and negotiate new side agreements regarding matters of local concern on an as needed basis." *Id.* at 519. The court found that "the side agreement validly became a part of the collective bargaining agreement, and the Company committed no breach in denying . . . the transfer." *Id.* The court further found that because the union had apparent authority to negotiate the side agreement, the side agreement was valid and binding even in the absence of membership ratification. *Id.* at 520. The court rejected an argument that

the local union lacked authority to bind the international union to a side agreement under the terms of the union constitution. *Id.* Consequently, the court found that the union did not breach its duty of fair representation in refusing to pursue the affected employee's grievance. *Id.*

In the present case, there is similarly no basis for concluding that the Union lacked authority to negotiate a binding side agreement supplementing, rather than contradicting, the terms of the 1998 collective bargaining agreement. This is particularly true since the supplemental agreement for drivers' incentive pay was merely a continuation of a long-standing practice to which the Union and the Company had agreed for more than 20 years. *Central States Southeast & Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1113 (6th Cir. 1986) (holding that ratification of a side agreement was unnecessary because of general practice of negotiating side agreements without ratification); *NLRB v. International Union of Elevator Constructors Local No. 8*, 465 F.2d 974, 975 n.1 (9th Cir. 1972) (holding that contract was valid without membership ratification when there was an "established history of entering into bargaining agreements without such ratification"). Federal labor law imposes no requirement that agreements negotiated by a statutory bargaining representative be ratified or otherwise approved by membership to be valid. *See, e.g., Appalachian Shale Prods.*, 121 N.L.R.B. 1160 (1958) (holding that even though collective bargaining agreement was not ratified, it operated as a bar to a decertification petition filed by employees); *United Health Care Servs., Inc.*, 326 N.L.R.B. No. 144, 163 L.R.R.M. (BNA) 1061 (1998) (same); *see also Confederated Indep. Unions v. Rockwell-Standard Co.*, 465 F.2d 1137, 1140 (3d Cir. 1972); *Meyerson v. Contracting Plumbers Ass'n*, 606 F. Supp. 282 (S.D.N.Y. 1985); *Conran*

*v. Great Atl. & Pac. Tea Co.*, 499 F. Supp. 727, 730 (E.D. Pa. 1980). In fact, it is an unfair labor practice under the NLRA for a union or an employer to insist upon ratification once the parties have reached an otherwise valid collective bargaining agreement. *NLRB v. Seneca Envtl. Prods.*, 646 F.2d 1170 (6th Cir. 1981); *NLRB v. Electra-Food Mach., Inc.*, 621 F.2d 956, 958 (9th Cir. 1980); *NLRB v. Truck-drivers, Chauffeurs & Helpers, Local Union No. 100*, 532 F.2d 569 (6th Cir. 1976); *Elevator Constructors Local 8*, 465 F.2d at 974; *Houchens Mkt. v. NLRB*, 375 F.2d 208 (6th Cir. 1967). Rather, as the statutory bargaining representative, the Union has full authority under Section 9 of the NLRA to negotiate a binding collective bargaining agreement and any side agreement or modification to a collective bargaining agreement, with or without membership approval.

The court of appeals found that the negotiation of a verbal agreement with the Union regarding an incentive plan for drivers could support Respondents' claim for breach of the 1998 agreement. This finding ignores basic labor law. The law is clear that a union and an employer may enter into an agreement that "modif[ies], supplement[s], or amend[s] the collective bargaining contract." *Watson v. IBT*, 399 F.2d 875, 879 (5th Cir. 1968) (citations omitted); *see also Local 1316, IBEW v. Superior Contractors & Assocs.*, 608 F. Supp. 1246, 1250 (N.D. Ga. 1985) (citing *Watson* with approval). This flexibility between a union and an employer reflects a "mutual interdependence" of the parties in "filling in the details" of the collective bargaining agreement. *See Watson*, 399 F.2d at 879. Moreover, since the inception of the NLRA, the NLRB and the courts have recognized and enforced both oral and written collective bargaining agreements. *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243

(7th Cir. 1982); *Cappa v. Wiseman*, 659 F.2d 957, 960 (9th Cir. 1981); *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 355-56 (5th Cir. 1981); *Rabouin v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952); *Hamilton Foundry & Mach. Co. v. International Molders & Foundry Workers Union*, 193 F.2d 209, 214 (6th Cir. 1951).

It is undisputed that Gold Kist and the Union negotiated and entered into an agreement for a driver incentive plan. It is also undisputed that this incentive plan had been in place for more than 20 years prior to 1998. Likewise, construing the facts in Respondents' favor, Gold Kist and the Union entered into this side agreement to continue the driver incentive plan *after* the 1998 contract was signed. Side agreements between Gold Kist and Respondents' exclusive bargaining representative are not prohibited by the collective bargaining agreement. (App. at 68a.) In fact, the stated "purpose" of the contract is to provide flexibility to Gold Kist and the Union in "increas[ing] the effectiveness of the working and economic relationships" between the parties. (App. at 68a.) Most important, the contract clearly and unequivocally states that feed mill employees, including Respondents, do not receive incentive pay, but instead receive an hourly premium. (App. at 105a.)

It is undisputed that Respondents have received all compensation to which they are entitled under the collective bargaining agreement. It is further clear under the NLRA that Gold Kist could not be compelled to institute an incentive plan or any other form of compensation. Gold Kist did not, therefore, breach the contract by entering into a supplemental agreement with the Union regarding a driver incentive program.

## II.

### The Eleventh Circuit's Decision That Respondents Have Alleged Facts Sufficient To Sustain A Claim For Breach Of The Union's Duty Of Fair Representation Is Contrary To Decisions Of This Court And Other Courts Of Appeals.

The Union's failure to obtain an incentive plan for feed mill employees while entering into an agreement with Gold Kist that drivers may be paid the greater of amounts earned under the incentive plan or the hourly wage schedule contained in the contract did not violate the Union's duty of fair representation to the feed mill employees.

It is a well-established principle of labor law that a union has a duty to fairly represent all the employees subject to a collective bargaining agreement. *See, e.g., Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991). Likewise, the union's duty of fair representation extends to both negotiation of collective bargaining agreements and the enforcement and administration of collective bargaining agreements. *See IBEW v. Foust*, 442 U.S. 42 (1979). A union's duty of fair representation requires it "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)). However, a union's actions are arbitrary and a breach of its fair representation duty "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside of a 'wide range of reasonableness' as to be irrational." *Air Line Pilots*, 499 U.S. at 67 (quoting *Ford Motor Co. v. Huffman*, 345

U.S. 330, 338 (1953)). Therefore, a union is vested with considerable discretion in fulfilling its statutory obligation to fairly represent employees in a bargaining unit.

A court's role in examining a union's performance of its duty of representation is "highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots,* 499 U.S. at 78. In fact, the union is vested with such a "wide range of reasonableness" that courts have held that mere negligence by a union does not amount to a breach of the union's duty of fair representation. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988).

The Court's decision in *Huffman*, 345 U.S. 330, conclusively demonstrates that the allegations found in the Amended Complaint fail to establish a claim for breach of the duty of fair representation by the Union in negotiating the driver incentive plan. In *Huffman,* the union and employer agreed to afford seniority credit for both pre- and postemployment military service. The Selective Training and Service Act of 1940, 50 U.S.C. § 308, required seniority credit only for postemployment military service. As a result of the agreement to credit preemployment military service for seniority purposes, employees with credit for postemployment service suffered a reduction in seniority as compared to other employees. *Id.* at 331-32. The Court sustained summary judgment for the union and the employer, finding no violation of the union's duty of fair representation. The Court observed:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not

> make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. . . . Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the . . . nature of the work [and] the time at which it is done . . . .

*Huffman*, 345 U.S. at 338-39. The Eleventh Circuit's decision in the instant case substantially departs from the established standards for evaluating a union's fulfillment of its duty to represent employees fairly.

The Eleventh Circuit majority opinion in this case is also in direct conflict with a recent decision by the Second Circuit. In *Spellacy v. Airline Pilots Association-International*, 156 F.3d 120, 127 (2d Cir. 1998), the court held that a union's position that a contract's seniority provision did not apply to the transfer of pilots from a financially moribund airline to a second airline in a partial-asset purchase was not so unreasonable as to constitute a breach of the duty of fair representation. Likewise, the *Spellacy* court recognized that "[a] union's reasoned decision to support the interests of one group of employees over the competing interests of another group does not constitute arbitrary conduct." *Id.* at 129 (citations omitted); *see also Griffin v. Air Line Pilots Ass'n, Int'l*,

32 F.3d 1079 (7th Cir. 1994); *Van Leeuwen v. United States Postal Serv.*, 628 F.2d 1093, 1096-97 (8th Cir. 1980); *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321, 1330 (5th Cir. 1980); *Goodin v. Clinchfield R.R. Co.*, 229 F.2d 578, 579 (6th Cir. 1956).

Like the union in *Spellacy*, the Union here did not interpret the current contract to preclude the drivers from receiving incentive pay. Moreover, nothing in the contract prohibits a group of employees from making more than the prescribed minimum hourly rate set forth in the contract. Because the drivers and feed mill employees perform different functions and perform these functions in entirely different circumstances, it was within the realm of the Union's reasoned decision-making to continue to allow Gold Kist to pay drivers the greater of the amount earned under incentive pay or the hourly wage rates contained in the contract. The Union's well-reasoned decision that the contract's wage schedule constitutes a minimum wage and that Gold Kist could pay the drivers on an incentive basis in excess of the schedule does not constitute a breach of the duty of fair representation. There is simply no evidence that the Union breached its duty of fair representation to the feed mill employees. Given the long history of the compensation scheme for the Jasper Feed Mill, any contention that the Union's negotiation of such a compensation scheme is arbitrary, discriminatory, or in bad faith is untenable and clearly fails to meet the standard established by the Court for stating a claim for breach of the Union's duty of fair representation.

The Union properly discharged its duty of fair representation to the feed mill employees. The facts are uncontroverted that in bargaining sessions for the 1998 contract, the Union and Gold Kist negotiated over the Union's proposal for the establishment of a feed mill employee incentive plan.

*See Parker*, 855 F.2d at 1520 n.7 (company's duty to bargain in good faith does not require that it agree to unacceptable proposals). Although the Union was unsuccessful in obtaining an incentive plan for the feed mill employees, those employees did receive a wage increase for each year of the 1998 contract.

As discussed above, Section 8(d) of the NLRA makes clear that in collective bargaining negotiations, no party may be compelled to agree to a proposal or make a concession in bargaining. 29 U.S.C. § 158(d). In light of this restriction on the authority of courts, arbitrators, and the NLRB, it cannot be seriously contended that the Union breached its duty of fair representation by failing to obtain Gold Kist's agreement to a new incentive plan for the feed mill employees. This is particularly true where the Union proposed such a plan and discussed the proposal at length during negotiations. Essentially, Respondents allege that the Union should be liable for its failure to exercise authority that the NLRA specifically denies to the courts and the NLRB. Had the Union arbitrarily refused to seek through negotiation an incentive plan for feed mill employees, Respondents' claims would have somewhat more force. That the Union actually proposed and attempted to secure Gold Kist's agreement to incentive pay for feed mill employees demonstrates the absence of any arbitrariness in its representation of Respondents. Additionally, the Union achieved for feed mill employees, through negotiation, an additional 10 cents an hour in lieu of incentive pay.

Under the reasoning of the court of appeals majority, in order to state a claim for breach of the Union's duty of fair representation, a litigant need be required to show only that the Union negotiated an agreement that favors one group of represented employees more than another. Inasmuch as most

collective bargaining agreements provide for different pay rates for the various employee classifications covered, virtually every union, under the ruling of the Eleventh Circuit, will be subject to litigation and claims for breach of the duty of fair representation for virtually any agreement it has negotiated. This absurd result illustrates the importance of the questions presented by this writ and the need to address these questions at the summary judgment stage of the case.

## III.

### Respondents Have Failed To Fulfill The Procedural Requirements Of A Hybrid Section 301/ Duty Of Fair Representation Case Because They Failed To Exhaust Their Contractual Remedies.[1]

The Amended Complaint that initiated this action sets forth *one* alleged breach of the collective bargaining agreement—that Gold Kist, by agreeing to a driver incentive plan, paid drivers more than the contractual wage rate. (App. at 60a-61a.) The Eleventh Circuit additionally found that a jury could conclude that the agreement had been breached because Gold Kist and the Union agreed to an *oral* side agreement for incentive pay whereas the agreement provides that modifications must be made in writing, and because the agreement prohibits "individual agreements"

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[1] As discussed in Section I above, Respondents have failed as a matter of law to allege facts sufficient to sustain a claim for breach of the collective bargaining agreement. Even if Respondents could maintain an action for breach based on the facts alleged, their failure to exhaust their contractual remedies would bar this action.

between Gold Kist and "an employee." (App. at 5a.) The Amended Complaint may also be arguably read to allege a claim that the Union, in negotiating a side agreement that favored drivers with an incentive plan while not obtaining such an incentive plan for feed mill employees, violated its duty of fair representation.

Any claim based on the Union's alleged failure to fulfill its duty of fair representation in negotiating such a side agreement, however, in no way implicates Gold Kist. Indeed, in negotiating the collective bargaining agreement, Gold Kist was required only to bargain in good faith and was entitled to exercise its right under the NLRA to negotiate a contract with the most favorable possible economic terms for the Company. In negotiating the contract, Gold Kist owed no duty to Respondents. The only duties owed to Respondents by Gold Kist are those contractual duties assumed by Gold Kist in the collective bargaining agreement.

While an alleged breach of the Union's duty of fair representation in *negotiating* a collective bargaining agreement may arguably not be subject to an exhaustion requirement (*see Beriault v. Local 40, Super Cargoes & Checkers*, 501 F.2d 258 (9th Cir. 1974)), Respondents' claims here that Gold Kist breached the agreement were clearly subject to the contractual grievance and arbitration provisions. Respondents were therefore required to exhaust their contractual remedies before bringing this action. Because there is no possible breach of the agreement by Gold Kist that is excused from the exhaustion requirement, this hybrid Section 301/duty of fair representation claim cannot be maintained *even if* a separate claim based solely on the Union's breach of the duty of fair representation arising from the negotiation of the side agreement were viable.

The 1998 agreement contains a grievance and arbitration procedure that requires exhaustion of the employees' rights under the contract prior to commencement of a suit in federal court. (App. at 94a-96a.) *See Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) (federal labor policy requires employees to use contract grievance procedure for redress); *Hayes v. Reynolds Metals Co.*, 769 F.2d 1520, 1522 (11th Cir. 1985) (same); *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881, 885-86 (11th Cir. 1985) (same). The grievance and arbitration procedure was in full effect at all times relevant to Respondents' claims and was clearly available to resolve any claim that Gold Kist violated the collective bargaining agreement by paying employees more than the contractual wage rates, by modifying the contract without a written document, or by entering into an "individual agreement" with an employee.[2] As the district court recognized, Respondents do not even allege that they have attempted to utilize the grievance and arbitration procedure set forth in the contract. (App. at 26a.)[3]

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[2] It should be noted that any such "individual agreement" would also constitute an unfair labor practice under Section 8(a)(5) of the NLRA. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

[3] It is likewise important to reiterate that the driver incentive plan had been in effect over 20 years at the time the 1998 contract was negotiated. There was nothing hidden or secretive about it. Similarly, the 1998 contract was ratified by at least 11 of the 17 mill workers—several of whom are Respondents in this action. Those Respondents knowingly ratified the 1998 contract, which they knew contained no feed mill worker incentive plan (even

(continued...)

Respondents allege no facts to support any finding that the failure to exhaust contractual remedies should be excused. More specifically, they do not allege any conduct by Gold Kist that "amounts to a repudiation of those contractual procedures." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). Neither can Respondents establish that the Union wrongfully refused to process a grievance based on an asserted breach of the agreement by Gold Kist. *Id.* Finally, Respondents cannot establish that the Union breached its duty of fair representation in handling any grievance, because no grievance was even attempted. *Id.* at 186; *see also Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563-66 (1976).

Unlike in *Hines*, any alleged breach of the Union's duty of fair representation in the present case was completely unrelated to the availability or effectiveness of the contractual grievance and arbitration procedure. In *Hines*, employees who were discharged without just cause failed in their grievance as a result of inadequate and incompetent representation by their union representative. *Id.* at 558. The Court found that in such circumstances, the exhaustion requirement could be excused and an action could be maintained against both the employer and the union. The Court therefore concluded that an employer that had "played its part in precipitating this dispute" by discharging the em-

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[3] (...continued)
though such a provision had been sought during negotiations). They thereafter failed to file any grievance over the longstanding truck driver incentive plan, and then they filed the lawsuit that is the basis for this proceeding. Those Respondents purposely bypassed the contractual grievance and arbitration procedure so they could attempt to gain through litigation what their union had been unable to achieve through good-faith collective bargaining.

ployees in alleged violation of the agreement could not insist on exhaustion of contractual grievance procedures in the face of the union's failure to perform its representational duties. *Id.* at 567-69. The Court has never held that exhaustion should be excused where a union's alleged breach of its duty of fair representation is unrelated to the presentation or processing of a grievance.

In the present case, the only alleged breach of the Union's duty of fair representation is the negotiation of the incentive plan on behalf of the drivers. There is no possible conclusion that this alleged breach of the Union's duty in any way prevented Respondents from challenging alleged contract breaches by Gold Kist in a grievance. In any event, Respondents did not even attempt to file a grievance prior to filing this action.

As the district court found, based on undisputed facts, Respondents are all aware of the contractual grievance procedure, yet none of them filed a grievance regarding any alleged breach of contract prior to commencing this suit. That this ground for seeking writ may be stated briefly should not be read to diminish its importance as a matter of federal labor policy. The NLRA provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for the settlement of grievance disputes . . . ." 29 U.S.C. § 173(d). This statutory policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960). To allow an employee to maintain a Section 301 claim without first exhausting the contractual grievance procedures "would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of em-

ployee grievances [and] 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" *Republic Steel*, 379 U.S. at 653 (quoting *Local 174, IBT v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962)).

Respondents' claims were properly dismissed by the district court for the reasons above.

## CONCLUSION

For the foregoing reasons, Gold Kist respectfully requests that the Court grant its petition for writ of certiorari.

Dated this the 10th day of July, 2000.

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